

On December 1, 1999 appellant, then a 49-year-old carpenter, filed a traumatic injury claim alleging that on November 5, 1999 he sustained right shoulder and left arm strains as a result of loading computers onto a truck. He stopped work on December 2, 1999. The Office

accepted the claim for left shoulder strain and bilateral elbow tendinitis. It paid appellant appropriate compensation.

By decision dated September 21, 2004, the Office terminated appellant's compensation for wage-loss and medical benefits with regard to his accepted November 5, 1999 employment-related injuries, effective that date. It accorded weight to a July 8, 2004 medical report of Dr. Aubrey A. Swartz, an Office referral physician, who found that appellant no longer had any residuals or disability causally related to his accepted employment injuries.

Appellant requested reconsideration by letters dated October 20, 2004, April 1 and June 10, 2005 and June 13, 2006. He submitted medical evidence in support of his contention that he continued to have employment-related residuals and disability. In reports dated October 30, 2004, June 3, August 19 and December 16, 2005 and May 15, 2006 Dr. Paul F. Ware, an attending Board-certified surgeon, stated that appellant continued to have bilateral shoulder symptoms which worsened, who opined that he was totally disabled from working as a carpenter due to his November 5, 1999 employment injuries. He stated that appellant could perform light-duty work with permanent restrictions related to both upper extremities. Dr. Ware recommended a lifetime spa membership to maintain appellant's maximal function. In a January 28, 2005 report, he noted range of motion measurements and determined that appellant sustained a 26 percent impairment of the left upper extremity which represented a 16 percent impairment of the whole person based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001).

In an October 19, 2004 report, Dr. James Spiegel, an attending Board-certified orthopedic surgeon, opined that appellant was permanently disabled from carpentry work based on his musculoskeletal examination. A December 11, 2003 report of Dr. Martin Trieb, an attending Board-certified orthopedic surgeon, stated that appellant's right shoulder impingement syndrome and laxity and early arthritic changes in the left glenohumeral joint were caused by the accepted employment injury.<sup>1</sup> He related that appellant had no disability prior to the 1999 employment injury. Dr. Trieb recommended a lifetime spa membership. Reports from appellant's physical therapists indicated that he was treated during the period April 15, 2004 through May 10, 2005. An undated report of Dr. Laura E. Garvin, a Board-certified internist, stated that she first evaluated appellant on December 2, 1999 and reviewed a history of the November 5, 1999 employment injury. She related that he was diagnosed with post-traumatic stress disorder by the Department of Veterans Affairs. Dr. Garvin was unable to comment on appellant's ability to work because he had not followed up with her since December 6, 1999. At that time, she believed that appellant could not perform certain physical work duties. From a mental standpoint, Dr. Garvin stated that appellant had difficulty interacting with his bosses and, he remained depressed and was not taking his medication.

By decisions dated November 18, 2004, April 25 and July 26, 2005 and August 2, 2006, the Office denied modification of its termination decision. It found that the reports from appellant's physical therapists did not constitute probative medical evidence as a physical therapist is not considered to be a physician. The Office further found that the medical opinions

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<sup>1</sup> The Board notes that Dr. Trieb stated that the date-of-injury was December 5, 1999 rather than November 5, 1999.

of Dr. Spiegel and Dr. Ware were not sufficiently well rationalized to establish that appellant had residuals or disability causally related to his November 5, 1999 employment-related injuries as they were not based on objective findings. It found that Dr. Garvin's medical opinion had no probative value since she did not opine that appellant experienced continuing employment-related residuals or disability

On September 5, 2006 appellant requested reconsideration of the Office's August 2, 2006 decision.

In an October 13, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant further merit review.

By letters dated May 1 and July 18, 2007, appellant, through counsel, requested reconsideration of the August 2, 2006 decision. Counsel contended that the reports of Drs. Ware, Spiegel, Garvin and Trieb established that appellant had residuals and disability causally related to his accepted employment-related injuries. Contrary to the Office's finding that Dr. Ware did not provide objective findings to support his opinion that appellant was permanently disabled from his carpenter position, the physician set forth appellant's physical restrictions and reported his range of motion findings in support of his finding that appellant sustained a 26 percent impairment of the left upper extremity. Counsel contended that Dr. Swartz's medical report was of diminished probative value as he failed to provide medical rationale to support his findings that appellant sustained temporary aggravation of a preexisting left shoulder condition which ceased on August 1, 2001 and that he no longer had any employment-related residuals or required further medical treatment. He noted that Dr. Swartz's physical restrictions precluded appellant from performing his regular work duties as a carpenter. Counsel requested reinstatement of his lifetime spa membership based on Dr. Ware's and Dr. Trieb's opinion that it was beneficial. He stated that Dr. Spiegel's June 19 and 22, 2007 reports, which established a causal relationship between appellant's November 5, 1999 employment injuries and his continuing medical condition, accompanied the July 18, 2007 reconsideration request.

In an October 25, 2007 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant or repetitious in nature, and insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(1)(2).

Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

### **ANALYSIS**

In letters dated May 1 and July 18, 2007, appellant, through counsel, disagreed with the Office's termination of his wage-loss compensation and medical benefits effective September 24, 2004 on the grounds that he no longer had any residuals or disability causally related to his November 5, 1999 employment-related bilateral shoulder strain and bilateral elbow tendinitis. The underlying issue is, whether appellant had any continuing employment-related residuals or disability causally related to the accepted employment injuries, is medical in nature.

In the requests for reconsideration, counsel contended that the Office improperly terminated appellant's compensation benefits as the reports of Drs. Ware, Spiegel, Garvin, Trieb established that appellant had residuals and disability causally related to his November 5, 1999 employment-related injuries. Although counsel cited to evidence which he believed was not properly weighed by the Office, he did not submit any new or relevant medical evidence to warrant further merit review. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>5</sup> The reports cited by counsel were of record and considered by the Office in its prior decisions. They do not constitute relevant and pertinent new evidence not previously considered by the Office.

Counsel contended that Dr. Swartz's July 8, 2004 report was of diminished probative value as it lacked medical rationale to support his finding that appellant no longer had any employment-related residuals or disability. He further contended that appellant's lifetime spa membership should be reinstated based on, the opinions of Dr. Ware and Dr. Trieb. Counsel stated that appellant's July 18, 2007 request for reconsideration included Dr. Spiegel's June 19 and 22, 2007 reports which established that his continuing shoulder and elbow problems were causally related to his November 5, 1999 employment injuries. However, these reports are not of record. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>6</sup> Counsel's arguments are, therefore, insufficient to warrant reopening appellant's claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office. As he did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.<sup>7</sup>

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<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>6</sup> *Patricia G. Aiken*, 57 ECAB 441 (2006).

<sup>7</sup> *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board